90-958

No. _____

In The

Supreme Court of the United States

October Term, 1990

GEORGE S. NONNETTE and WILLIAM J. NONNETTE,

Petitioners,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals Of The State of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the failure to provide testimony of the basis of the officer's knowledge in making a judicial determination of the reasonableness of a finding of probable cause to search an automobile without a warrant fatal to a determination of the existence of probable cause?

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Petitioners, GEORGE S. NONNETTE and WILLIAM J. NONNETTE, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Third Appellate District, filed May 31, 1990, affirming petitioner's convictions in the case.

OPINION BELOW

The partially published opinion of the Court of Appeal of the State of California, Third Appellate District, is reproduced in the Appendix hereto at A-1 through A-17.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a) on the ground that their due process rights under the Fourth Amendment to the U.S. Constitution were violated. The California Court of Appeal issued its opinion affirming the petitioner's convictions on May 31, 1990. The California Supreme Court denied review on August 15, 1990.

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

United States Constitution, Fourth Amendment, California Constitution, Article 1, Section 13 and California Health and Safety Code § 11351.5. See Appendix at A-19 through A-20 for verbatim statement of these authorities.

STATEMENT OF THE CASE

The facts establish that while on routine patrol, Officer Luis Flores of the Sacramento Police Department, whose experience was elicited by testimony only as near twenty years in the patrol division, (CT 5, 25-28) was

contacted at 1:30 p.m. in the afternoon of February 18, 1988, by radio dispatch about a telephoned anonymous citizen's report that "there was a yellow Cadillac in a cul-de-sac with four male blacks that were ducking up and down in the seats." (CT 20, 27-28.) On the way to the scene, dispatch advised Flores that the vehicle was registered to petitioner George Nonnette at an address in Los Angeles. (RT 57, 16-26.) Upon arrival at the scene, no unusual or suspicious activity was observed and the Cadillac appeared empty. After talking to another citizen who drove up to talk to the officer about unrelated events for five to ten minutes, Flores prepared to leave but then saw petitioner William Nonnette in the driver's seat of the Cadillac. (RT 27, 10-24).

Prior to approaching, Flores saw no activity at all in or around the yellow Cadillac, nor did he see anyone "ducking up and down." (RT 52, 21-24.) Officer Flores then approached the Cadillac on the passenger side, nearest the curb, and observed petitioner George Nonnette in the right rear seat, who appeared to be asleep, and two juveniles, one in the right front seat and one in the left rear seat. Officer Flores "woke them all up" and asked for their identification. (RT 31, 1-2.) Only George Nonnette provided a valid California driver's license, the others correctly identified themselves orally. (RT 58, 14-15.)

After asking what they were doing there (in what Officer Flores believed to be a high drug area, RT 52, 3) and being told that they were there to visit a friend, including George Nonnette showing an address of the friend in North Highlands, about 30 minutes away, (RT 59, 25-27, CT 45, 16-17) Officer Flores observed a black man's clutch purse, opened, in the map pocket on the

back of the front passenger's seat, with empty plastic baggies clearly visible from his location on the right side of the car. (RT 31, 24-28.) At that time, after observing only the empty plastic baggies in the purse, Flores reached into the car and seized the baggies and the purse, (RT 32, 2-3) and made the appellants get out of the car. (CT 11, 27-28, RT 63, 14-19.) In a subsequent search of the contents of the purse, Flores found an opaque prescription pill bottle which contained contraband. (RT 32, 6-14.)

On February 22, 1988, Complaint No. 88F01065 was filed against each petitioner in Sacramento Municipal Court, (CT 1, 7), alleging a violation of Health and Safety Code § 11351.5, possession of base cocaine for sale. On October 28, 1988, both petitioners were found guilty by a jury of the charged offense. (CT 273-276) On November 23, 1988, the trial court sentenced petitioner George Nonnette to state prison for the upper term of five years. Petitioner William Nonnette was sentenced to six years in state prison.

Both petitioners appealed their convictions to the Third District Court of Appeal. On May 31, 1990, the Court of Appeal affirmed their convictions. (Appendix p. A-15) Subsequently, the California Supreme Court denied review on August 15, 1990. (Appendix p. A-18)

REASONS FOR GRANTING THE WRIT

THIS CASE HOLDS CONTRARY TO EXISTING LAW THAT NO FOUNDATIONAL TESTIMONY IS REQUIRED REGARDING A POLICE OFFICER'S BASIS FOR DETERMINATION OF PROBABLE CAUSE IN WARRANTLESS AUTOMOBILE SEARCHES. IT WOULD BE AN APPROPRIATE CASE TO AFFIRM THAT THE SAME STANDARD OF PROBABLE CAUSE APPLIES TO SEARCHES WITH WRITTEN WARRANTS AND TO WARRANTLESS AUTOMOBILE SEARCHES.

The Fourth Amendment of the United States Constitution and Article 1, Section 13 of the California Constitution protect citizens against unreasonable searches and seizures. A warrantless search and seizure is per se unreasonable with only a few carefully circumscribed exceptions. (*United States v. Ross*, 456 U.S. 798, 822, 102 S.Ct. 2157, 72 L.Ed. 572 (1982); *People v. Laiwa* 34 Cal.3d 711, 725, 195 Cal.Rptr. 503 (1983).) In *United States v. Ross*, supra, at p. 825, this Court reaffirmed the rule that police officers are required to demonstrate objectively verifiable probable cause to believe contraband or evidence of crime is located in a vehicle before a warrantless search is deemed lawful under the "automobile exception" of the Fourth Amendment.

Moreover, this court has held that lawful plain view seizures require probable cause. (*Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 1153-1154, 94 L.Ed. 347 (1987).)

The California Supreme Court set forth the standard for probable cause to search in *Wimberly v. Superior Court*, 16 Cal.3d 557, 128 Cal.Rptr. 641 (1976). The court held that probable cause for a search exists where "an officer is aware of facts that would lead a man of ordinary caution

or prudence to believe, and consciously entertain, a strong suspicion that the object of the search is in the particular place to be searched". (*Id.* at p. 564.)

Probable cause must be determined from the "totality of the circumstances", *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In making determinations of probable cause, the United States Supreme Court has previously held that the experience and training of an officer is a critical factor in determining whether his judgment regarding the existence of probable cause was an objectively reasonable one. (*Texas v. Brown*, 460 U.S. 730, 102 S.Ct. 1535, 75 L.Ed. 502 (1983).)

In *Texas v. Brown*, the United States Supreme Court gave substantial weight to the foundational basis of an officer's knowledge where the officer's probable cause to search is based upon the officer's own observations of a citizen holding a container commonly used for innocent purposes. A similar ruling regarding the importance of foundational testimony by the officer came from the Third District Court of Appeal in California in *People v. Huntsman*, 152 Cal.App.3d 1073, 200 Cal.Rptr.89 (1984). Both the *Huntsman* and *Texas v. Brown* cases involved warrantless automobile searches with narcotics ultimately being seized. Other state and district court decisions have commonly included the foundational basis of an officer's knowledge as a necessarily included factor in determining the reasonableness of a magistrate's finding of probable cause in narcotics cases where a warrant was issued based upon the officer's affidavit. (*United States v. Ciampa*, 793 F.2d 19, 22 (1st Cir. 1986); *United States v. Benevento*, 836 F.2d 60, 70, 71 (2nd Cir.1987).) Additionally, the foundation of the officer's knowledge has

been considered critical to a determination of probable cause in "lottery-sting" warrant cases and border patrol warrantless search cases. *(State v. Swales*, 12 Md.App. 69, 277 A2d 449, 459, 460 (1971); *United States v. Cortez*, 449 U.S. 411, 421, 422, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).)

For example, the court in *United States v. Bekoff*, 529 F.Supp. 425, 432 (1982) articulated a standard by which airport narcotics stops should measured. One of the factors the court considered was the following: "any observations made by the officer must be viewed through the eyes of an agent who is trained and experienced in discerning ostensibly innocuous behavior the indicia of narcotics trafficking."

Accordingly, the court in *Thomas v. Superior Court*, 22 Cal.App.3d 972, 99 Cal.Rptr. 647 (1972), overturned the lower court's finding of probable cause when the arresting officer had testified to seeing a "hand-rolled" cigarette in white paper on the back seat of the defendant's car. The officer then concluded that the cigarette was a violation of the Health and Safety Code. The court reasoned that "there was no evidence concerning the circumstances or prior visual experience, if any, which caused the officer to form this on-the-spot opinion. The officer gave no testimonial comparison between the appearance of hand-rolled tobacco cigarettes and hand-rolled marijuana cigarettes".

"The lack of any evidence concerning the customary appearance of marijuana cigarettes left respondent court with no standard by which it could compare the seized

cigarette to determine whether the latter looked like contraband. For all that the record shows, petitioner was arrested for possession and the car was entered by the police simply because there was a 'hand-rolled' cigarette visible inside it". (*Id.*at p.650.)

The importance of establishing a foundational basis by the officer, usually provided by an affidavit or testimony of a combination of the officer's particular experience and training, to determine whether probable cause exists has been clearly established in existing law.

Unlike those cases which rely upon the recitation of the officer's training and experience, in the present case the only testimony elicited by the officer was that he had been on the police force for close to twenty years. According to the opinion of the Court of Appeal, the officer's observation of an empty bundle of baggies provided him with an adequate basis to search and seize their property.

The Court of Appeal, Third Appellate District, claimed that the bundle of baggies found in the petitioners' car was inherently suspicious under the circumstances and therefore, no foundational testimony by the officer was required. The court attempts to distinguish its own prior ruling in *Huntsman* by stating that only a single common container (a plastic baggie) was observed by the officer in the *Huntsman* case, thus foundational testimony was necessary to establish probable cause.

In essence, the Court of Appeal simply chooses to ignore the well-established principal that an evidentiary foundation must be laid to establish the reasonableness of a warrantless seizure by simply declaring the plastic baggies, because there was a bundle instead of one, are

"inherently suspicious". However, "inherent suspicion" is obviously subject to widely divergent individual interpretations which do nothing to elucidate the standard of probable cause which must be present before a seizure without a warrant can take place.

By choosing to distinguish between a "single" container and a "bundle" of baggies, the Third District Court has ignored prior case law not only from California, but from the United States Supreme Court as well. This reasoning is without merit and the opinion is contrary to the United States Supreme Court decision in *Texas v. Brown, supra.* The issue raised by this case is of first impression in California and involves an important question of state and federal constitutional law. Because of the potential impact on every citizens' constitutionally protected rights, this issue must be settled. Thus, this Court should grant Certiorari to correct an error by the Court of Appeal that seriously impinges upon the right to be free from unreasonable searches and seizures.

CONCLUSION

For the reasons set out above, the petitioners respectfully request that this petition be granted and this Court address the issue discussed above.

DATED: October 30, 1990

Respectfully submitted,

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APPENDIX

NOT TO BE PUBLISHED

- COPY -

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM J. NONNETTE and GEORGE NONNETTE, Defendants and Appellants.	)	C005677 (Super. Ct. No. 83353) FILED MAY 31 1990

A jury convicted defendants William and George Nonnette of possession of cocaine base for sale. (Health & Saf. Code, § 11351.5.) In a separate proceeding the court found true the allegation that William had suffered a prior conviction, which added a one year enhancement to his sentence under Penal Code section 667.5, subdivision (b). William was sentenced to a total term of six years and George to five years. Both defendants appeal, contending the trial court should have suppressed evidence gathered in a warrantless search. We disagree and affirm the convictions.

FACTUAL AND PROCEDURAL BACKGROUND

William and George Nonnette and two juveniles were arrested in Sacramento after a police officer found rock cocaine in a clutch purse in their car.

At the preliminary hearing George made a motion pursuant to Penal Code section 1538.5 to suppress evidence found during a warrantless search of the car on the basis the officer lacked probable cause to seize and search the clutch purse which contained rock cocaine.

Two officers testified at the preliminary hearing. The arresting officer was Luis Flores, a 10-year veteran with the police department. He testified as to the events leading to the arrests on February 18, 1988. While on patrol he received a call from dispatch at about 1:30 in the afternoon that an unidentified citizen had reported a suspicious car parked on Caselli Circle containing four males who were ducking up and down. On his way to investigate Officer Flores learned the car was registered to a George Nonnette in Los Angeles.

When he arrived at Caselli Circle Officer Flores saw the car, but no one in it. He was then approached by a citizen who spoke to him for five to ten minutes about drug problems in the area of 7490 Franklin Boulevard. Officer Flores then saw George in the car. George was in the back seat on the passenger side; a juvenile was next to him. William was in the driver's seat and another juvenile was next to him. Officer Flores approached the car with his hand on his gun. He was suspicious because the car was from Los Angeles and he knew drugs came from there, and the car was parked in a high drug area. He testified he was always concerned with his personal safety, but the people in the car made no furtive gestures and did nothing to frighten him.

He approached the car and asked for identification. Only George, who said he owned the car, had identification. All four people in the car gave the officer their correct names.

George explained that he was in town to visit a friend. When asked, he showed the officer his friend's address; it was in North Highlands, a 30-minute drive away.

Officer Flores saw a man's black clutch purse in the map pocket behind the front passenger seat. The clutch purse was open and inside he saw a bundle of tiny baggies; they were empty. He could also see a white prescription bottle in the purse. The officer suspected drugs because he knew the baggies were the type used for drugs. He testified that seeing the baggies meant someone was selling something: "That's the normal thing in that area there. A lot of sales of drugs and the baggies alone means that somebody is selling something." He decided he should search the purse for two reasons. First, because it might contain drugs, and second, because he believed William was lying about having no identification and there might be some in the purse.

He ordered the four males out of the car and had them lie on the grass until his cover arrived.

He then searched the black bag. Inside he found 50 one-inch baggies and a prescription bottle with a name on it differing from any of the car's occupants. He opened the bottle and found 10 baggies containing rock cocaine and 16 pills known as cross-tops, as well as many pieces of pills. It was stipulated the bottle contained 4.19 grams of cocaine base. Officer Flores asked the men if

they had any money. William had $77 and George had $1229. On the floor of the car the officer also found a jacket with a bag containing 9.4 grams of rock cocaine in it and a pager. After finding the cocaine in the purse, Officer Flores also searched the trunk of the car.[3]

The second officer testifying at the preliminary hearing was not present at the arrest. He testified that based on his training and experience with narcotic arrests, he believed the drugs were possessed for sale.

After receiving briefing on the suppression motion, the magistrate denied the motion. Both George and William then moved to dismiss the charges; these motions were also denied.

In the trial court George moved to set aside the information under Penal Code section 995 and William moved to suppress evidence under Penal Code section 1538.5. Both motions were denied.

The case then went to trial. After three and a half days of testimony, the jury deliberated an hour and ten minutes before returning guilty verdicts as to both William and George.

A bifurcated trial was held on the issue of William's prior conviction; the court found that William had been convicted of a felony within the past five years. George was sentenced to the upper term of five years in prison and William to six years.

Both defendants have appealed.

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[3] After the arrest the car was impounded. A search of the entire car revealed additional rock cocaine in the door of the car.

DISCUSSION

I

Defendants contend the magistrate and the trial court erred in denying their motions to suppress evidence or dismiss the charges because the officer lacked probable cause to seize and search the black clutch bag without a warrant and no other exception to the warrant requirement applies. The Attorney General responds that the presence, in plain view, of baggies used to package drugs and the other circumstances surrounding the search gave the officer probable cause to search the car and all containers for drugs. In addition, the Attorney General advances two other theories to validate the warrantless search as a permissible limited search incident to a *Terry* (Terry v. Ohio (1968) 392 U.S. 1 [20 L.Ed.2d 889]) stop. George contends the circumstances did not justify a *Terry* stop; William concedes there was a lawful investigative detention under *Terry*, but claims this concession should not be read to concede there were facts from which Officer Flores might draw "specific reasonable inferences" that drug activity was involved. We believe the citizen's call concerning suspicious behavior provided a basis for a limited investigative intrusion by Officer Flores. (Terry v. Ohio, supra, 392 U.S. at pp. 21-22 [20 L.Ed.2d at p. 906].) However, we do not believe the issue of whether there was a proper *Terry* stop decides this case; instead, we find the dispositive issue in this case to be whether Officer Flores had probable cause to search the car. Before analyzing the probable cause question presented, we first briefly discuss why reliance on the limited searches permitted pursuant to a *Terry* stop is misplaced.

II

The Attorney General contends the search may be justified as a search for weapons. In *Terry v. Ohio*, supra, the United States Supreme Court held an officer may make a reasonable search for weapons to protect himself where he has reason to believe he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest. (Terry v. Ohio, supra, 392 U.S. at p. 27 [20 L.Ed.2d at p. 909].) In order to make a self-protective *Terry* search for weapons the officer must be able to point to particular facts from which he inferred the individual was armed and dangerous. (Sibron v. New York (1968) 392 U.S. 40, 64 [20 L.Ed.2d 917, 935].) Here Officer Flores did not testify to the particular facts from which he inferred the defendants were armed and dangerous. Although he approached the car with his hand on his gun, he indicated the defendants made no furtive gestures and did nothing to frighten him. He gave two reasons for wanting to search the clutch bag; neither involved weapons. Further, even if Officer Flores was justified in making a weapons search, the search of the clutch purse and pill bottle went beyond the permissible scope of such a search. A weapons search of the passenger compartment of a car must be limited to areas where a weapon could be placed or hidden. (Michigan v. Long (1983) 463 U.S. 1032, 1049 [77 L.Ed.2d 1201, 1220].) As the Attorney General concedes, a search for weapons would not Justify the search of the pill bottle where the drugs were found.

III

One of the reasons Officer Flores gave for searching the purse was to find William's identification. This reason

does not support the warrantless search either. A warrantless seizure and search of a wallet for identification purposes was held to be within the scope of an investigative detention under *Terry* in People v. Loudermilk (1987) 195 Cal.App.3d 996, 1001. In *Loudermilk* the defendant matched the broadcast description of a shooting suspect. When the police asked him for identification he said he had none. The police found his wallet and searched it for identification. (*Id.* at p. 1000.) The appellate court upheld the search, finding that a suspect's refusal to identify himself to the police may create confusion and may with other circumstances create probable cause for arrest. (*Loudermilk*, supra, 195 Cal.App.3d at p. 1002.) However, the court was careful to point out that its holding was limited to the facts before it, where the defendant lied to the officer and created the confusion as to his identity. The court explicitly stated it did not hold that a suspect may be searched simply because he refuses to produce identification or that an officer may always conduct a search for identification pursuant to a *Terry* stop. (*Id* at p. 1004.)

The facts of *Loudermilk* are distinguishable from the facts here. Although William claimed he did not have identification and Officer Flores may have reasonably believed he was lying, nothing in William's response gave Officer Flores reason to believe William was lying about his identity. He gave the officer his true name; his surname matched that of the one person in the car with identification, the registered owner of the car. William did not create any confusion as to his identity. Also, Officer Flores had no reason to believe the black clutch purse belonged to William. It was in the map pocket in

front of George, suggesting it more likely belonged to George. And finally, as with the search for weapons, a search for identification cannot justify a search of a pill bottle. In short, Officer Flores was justified in searching the pill bottle only if he had probable cause to believe the car contained drugs or other contraband. We now turn to the pivotal issue of probable cause.

IV

Defendants contend both the magistrate and the trial court erred in finding Officer Flores had probable cause to search the car and thus denying their motions to suppress the evidence found as a result of the search or to dismiss the charges. The motions before the trial court were submitted on the record of the preliminary hearing pursuant to Penal Code section 1538.5, subdivision (i). In these situations we disregard the findings of the trial court and review the determination of the magistrate. We review the evidence in the light most favorable to the magistrate's ruling and will uphold the magistrate's express or implied findings if supported by substantial evidence. (People v. Ramsey (1988) 203 Cal.App.3d 671, 679.) We then independently review whether these findings support the legal conclusion of probable cause. (People v. Leyba (1981) 29 Cal.3d 591, 598.)

The issue presented is whether the sight of a prescription bottle and a bundle of small, empty baggies in a car registered in Los Angeles and parked for some time in a high drug area of Sacramento, in which there were four males observed ducking up and down, only one of whom had identification, and who professed to be in town to

visit a friend who lived 30 minutes away, gave the officer probable cause to believe the car or a container in it held contraband.[4] We find that these circumstances are sufficient to support the magistrate's finding of probable cause to justify the seizure of the purse and the search of the purse or the car.

In response to defendants' contention that officer Flores lacked probable cause to seize the purse, the Attorney General contends the seizure was justified under the plain view doctrine: the presence of the baggies in plain view combined with other suspicious circumstances gave the officer probable cause to believe the purse contained contraband and thus justified the seizure under Texas v. Brown (1983) 460 U.S. 730 [75 L.Ed.2d 502]. The magistrate relied on the plain view doctrine in making his ruling. He denied the motion to suppress on the grounds the officer "had the right to be where he was and he observed what appeared to him to be contraband in plain view, and there were suspicious circumstances, . . . "

In *Texas v. Brown*, supra, the Supreme Court held an officer may, without a warrant, seize a container in plain view where the officer has probable cause to believe the container holds an illegal substance. (460 U.S. at p. 742 [75 L.Ed.2d at pp. 513-514].) In *Brown*, after stopping a driver at a routine driver's license checkpoint, the officer saw the man drop a knotted green balloon. The officer

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[4] If the officer had probable cause to believe the car contained drugs, then he could search the car and all containers within it that could contain drugs without a warrant under the automobile exception to the warrant requirement. (United States v. Ross (1982) 456 U.S. 798, 825 [72 L.Ed.2d 572, 594].)

also saw plastic vials, white powder and a package of balloons in the car's glove compartment. The officer knew, due to his experience with drug arrests, that drugs were often carried in knotted balloons. (*Id.* at p. 733 [75 L.Ed.2d at p. 508].) The high court found that the officer's knowledge of the distinctive manner of carrying drugs and the further suggestion of illicit activity apparent in the glove compartment gave him probable cause to believe the balloon contained drugs; its seizure was therefore valid under the plain view doctrine without a warrant. (*Id.* at p. 743 [75 L.Ed.2d at p. 514].)

In concluding that the officer had probable cause, the high court commented on the standard of probable cause: "As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer 'would warrant a man of reasonable caution in the belief,' [citation], that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability is all that is required. [Citation.]" (Texas v. Brown, supra, 460 U.S. at p. 742 [75 L.Ed.2d at p. 514].) We turn now to a determination of whether the facts known to Officer Flores "would warrant a man of reasonable caution in the belief" the car contained drugs.

Of the several suspicious circumstances contributing to Officer Flores' decision to search the clutch bag, the main factor, in the eyes of both the officer and the magistrate, was the officer's sighting of a bundle of small, plastic baggies. Defendants contend the magistrate could not rely on this fact in finding probable cause because

baggies are common containers with many legitimate uses, they are not so distinctive in nature as to indicate drug activity, and Officer Flores failed to provide sufficient foundational testimony to establish the basis for his suspicion that these common baggies were connected to an illegal activity. Defendants rely on a line of cases in which the courts have determined that the presence of a common container is insufficient to provide probable cause for a search or seizure.

Courts have held that certain containers are so distinctive in nature that an officer may, based on his experience with such containers in previous arrests, have probable cause to search or seize such a distinctive container in plain view. Examples of such containers are paper bindles (People v. Lilienthal (1978) 22 Cal.3d 891, 898-890; People v. Clayton (1970) 13 Cal.App.3d 335, 337-338), heroin balloons (People v. Lee (1987) 194 Cal.App.3d 975, 984), and brick-shaped packages smelling like marijuana. (People v. McKinnon (1972) 7 Cal.3d 899, 917.) However, where the container is a common one with legitimate purposes, its presence is not enough to establish probable cause. (Remers v. Superior Court (1970) 2 Cal.3d 659, 662-663 [tinfoil package]; People v. Holt (1989) 212 Cal.App.3d 1200, 1206-1207 [foil-wrapped package]; People v. Valdez (1987) 196 Cal.App.3d 799, 806-807 [film canister].)

In People v. Huntsman (1984) 152 Cal.App.3d 1073, this court required the officer to provide foundational testimony linking the common container he observed, a plastic bag, with illicit activity, before the presence of the plastic bag could be used as a suspicious circumstance contributing to probable cause. In *Huntsman*, while on a

vice assignment in an area known for prostitution, the police observed two men standing near an open trunk of a car; one man was holding an 8 by 11 inch plastic bag. The police could not see the bag's contents. When the police approached the man slammed the trunk closed. The officers then yelled, "Police, stop" and the men hurried away. (*Id.* at p. 1079.) The police detained defendant, who refused to identify himself. The police opened the locked trunk and found the plastic bag which contained smaller baggies with white powder in them. (*Id.* at p. 1080.) Defendant sought to suppress this evidence. The People argued there was probable cause for the search, relying on the following factors: defendant was holding the plastic bag, the person next to him appeared to be a lookout, it was in a high prostitution area, defendant slammed the trunk closed when the police approached, the men walked away faster after the police identified themselves, defendant refused to identify himself, and when detained defendant had the keys to the trunk but not the bag. (Id. at p. 1083.) This court found these factors insufficient to establish probable cause. (*Ibid.*)

Of primary concern was the lack of foundational testimony linking the bag with an illicit purpose, which would have made the officer's sighting of defendant holding the bag a suspicious circumstance contributing to probable cause. We noted that the officer's testimony did not indicate any expertise in determining whether such bags may contain contraband or any experience with such bags in prior narcotic arrests. (*Id.* at p. 1084.) We concluded: " . . . whether a common container constitutes a suspicious circumstance, capable of contributing to the totality of circumstances necessary for probable cause,

depends on the total factual context in which the container is observed, including the prior experience of the observing officer with containers of the sort at issue. . . . Accordingly, we hold that, in order to permit judicial review of the legality of a detention, arrest, or search, an officer's reasons for suspecting that a common container is being used for unlawful purposes must be articulated on the record." (*Id.* at p. 1088.)

Defendants contend that the magistrate could not determine probable cause because Officer Flores failed to articulate his reasons for suspecting that the baggies were being used for an unlawful purpose. Officer Flores testified before the magistrate that when he saw the baggies he knew something was being sold and that the baggies were the type used to package drugs. However, he did not provide the foundation for this knowledge; he did not testify to any experience with drug arrests or any expertise in drug packaging. Defendants contend this lack of foundation is fatal to our finding probable cause. Defendants are mistaken.

In *Remers, Holt, Valdez* and *Huntsman* the officer observed a single container that he suspected contained contraband. Since the presence of a single, legitimate container is not inherently suspicious, detailed testimony to establish the officer's reasonable basis for connecting this single container to criminal activity is required. Here a different case is presented. The officer did not observe a single small baggie. Instead, he saw a bundle of baggies of the type he knew to be used to package drugs. Further, he did not view this bundle in isolation, but as one piece of a suspicious picture. There were four males from Los

Angeles sitting in a car on a residential street in Sacramento, in an area known for high drug traffic. Only one had identication [sic]. They were miles away from their purported destination and had been observed engaging in suspicious behavior of ducking up and down. In these circumstances the bundle of baggies was inherently suspicious.

We recognize that California courts have traditionally been skeptical of the "high crime factor" in determining probable cause. (People v. Aldridge (1984) 35 Cal.3d 473, 478-479; People v. Loewen (1983) 35 Cal.3d 117, 124; People v. Bower (1979) 24 Cal.3d 638, 645.) However, after the passage of Proposition 8 in 1982, we must resolve search and seizure issues by determining whether the evidence should be excluded under federal standards. (In re Lance W. (1985) 37 Cal.3d 873, 886-887.) Under federal law, "[tlhe reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely. [Citations.]" (United States v. Rickus (3d Cir. 1984) 737 F.2d 360, 365.) Although Officer Flores provided no foundation for his assertion that the area was known for high drug activity, this evidence was not disputed and no further evidence was required. (People v. King (1989) 216 Cal.App.3d 1237, 1241.) The fact that a detention occurs in a high crime area may contribute to probable cause if it is relevant to the officer's belief that the suspect is involved in criminal activity. (*Ibid.*) Here the fact that Caselli Circle was known as an area of high drug activity was directly tied to Officer Flores's belief defendants were involved in illegal drug sales. This fact also further distinguishes *Huntsman*, supra, where the officers tried to rely on the area's reputation for prostitution to

support a seizure of a plastic bag used in drug activity. (152 Cal.App.3d at p. 1079.) When combined with the defendants' conduct in this high drug activity area, the bundle of baggies was inherently suspicious.

There was no need for a foundation explaining the basis of Officer Flores' suspicions about the bundle of baggies. We believe a "man of reasonable caution" would be warranted in the belief there might be illegal drugs present where there are four men acting sufficiently suspicious to have aroused citizen concern, parked for no apparent reason in a high drug area and possessing a large quantity of materials used to package drugs. The totality of the suspicious circumstances provided sufficient evidence to support the magistrate's finding that Officer Flores had probable cause to believe the car contained drugs. The motions to suppress were properly denied.

DISPOSITION

The judgment is affirmed.

MARLER, J.

We concur:

SPARKS, Acting P. J.

DeCRISTOFORO, J.

CERTIFIED FOR PARTIAL PUBLICATION

-C-O-P-Y-

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM J. NONNETTE and GEORGE NONNETTE, Defendants and Appellants.	C005677 (Super. Ct. No. 83353) FILED JUN 22 1990

ORDER OF PARTIAL PUBLICATION

APPEAL from a judgment of the Superior Court of Sacramento County. Steven H. Rodda, Judge. Affirmed.

Cynthia A. Thomas, Richard Phillips, under appointment by the Court of Appeal, for Defendant and Appellant William J. Nonnette, and Don L. Stockett for Defendant and Appellant George Nonnette.

John K. Van De Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Arnold O. Overoye, Senior Assistant Attorney General, Jane N. Kirkland, Janet Neeley Kvarme, Deputy Attorneys General, for Plaintiff and Respondent.

THE COURT:

The opinion in the above-entitled matter filed on May 31, 1990, was not certified for publication in the advance sheets and official reports.

For good cause it now appears the opinion should be partially published, and under California Rules of Court, rules 976 and 976.1 it is so ordered. The Reporter of Decisions is directed to publish those portions of the filed opinion entitled Facts, Part IV of the Discussion, and Disposition in the official reports.

FOR THE COURT:

SPARKS, Acting P. J.

MARLER, J.

DeCRISTOFORO, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Third Appellate District No. C005677
S016477

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

FILED
AUG 15 1990

THE PEOPLE, Respondent

v.

WILLIAM J. NONNETTE Et Al., Appellants

Appellants' petitions for review DENIED.

PANELLI
Chief Justice

AMENDMENT 4

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Const., Fourth Amendment

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§ 13. Searches and seizures; warrant

Sec. 13. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

(Added Nov. 5, 1974.)

Cal. Const., article I, section 13

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§ 11351.5. Possession of cocaine base for sale; punishment

Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale cocaine *base* which is specified in paragraph (1) of subdivision (f) of Section 11054, shall be punished by

imprisonment in the state prison for a period of three, four, or five years.

(Added by Stats.1986, c. 1044, § 4. Amended by Stats.1987, c. 1174, § 3, eff. Sept. 26, 1987.)

Cal. Health & Safety Code Sec. 11351.5
